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Federal Incarceration by Contract in a Post-Minneci World: Legislation to Equalize the Constitutional Rights of Prisoners

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FEDERAL INCARCERATION BY CONTRACT IN A POST-*MINNECI* WORLD: LEGISLATION TO EQUALIZE THE CONSTITUTIONAL RIGHTS OF PRISONERS

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In the 2012 case Minneci v. Pollard, *the United States Supreme Court held that federal prisoners assigned to privately-run prisons may not bring actions for violations of their Eighth Amendment right against cruel and unusual punishment and may instead bring actions sounding only in state tort law. A consequence of this decision is that the arbitrary assignment of some federal prisoners to privately-run prisons deprives them of an equal opportunity to vindicate this federal constitutional right and pursue a federal remedy. Yet all federal prisoners should be entitled to the same protection under the United States Constitution—regardless of the type of prison to which they are assigned. This Note discusses the national trend toward prison privatization and the current asymmetry in legal protections and remedies available to prisoners depending on whether they are assigned to federally-run or privately-run prisons. It concludes by proposing federal legislation that would provide uniformity in the protection of federal prisoners against cruel and unusual punishment.*

INTRODUCTION

Contracting out governmental functions in the United States is not a new phenomenon. For decades, the federal and state governments have contracted with private companies to outsource public services that private companies are capable of providing more cost-effectively.[1] In recent years, however, outsourcing has grown to include services that many consider to be "traditional governmental functions."[2] Outsourcing now pervades the provision of core governmental functions, such as the conduct of military operations, the management of public schools, and the administration of welfare and public benefits.[3] This ubiquitous expansion of government

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1. *See generally* KEVIN R. KOSAR, CONG. RESEARCH SERV., RL 33777, PRIVATIZATION AND THE FEDERAL GOVERNMENT: AN INTRODUCTION (2006).

2. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 *passim* (1985) (describing the concept of "traditional governmental functions").

3. *See, e.g.*, Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449, 1450–52 (2009); *see also* Laura Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 137–38 (2005) (discussing the privatization of military operations).

outsourcing has raised serious concerns about the accountability and transparency of the government to its citizens.[4]

The proliferation of government outsourcing has been driven, in part, by increased demand for services that the government simply lacks the resources to provide. Recent budget crises have heightened the government's pressure to outsource,[5] as have political movements vying to reign in "big government" by reducing public sector functions and services in favor of the private sector. This Note focuses on one area of government outsourcing that has particularly troubling consequences: the outsourcing of prison management to private, for-profit entities.[6] The privatization of prisons has stripped certain federal prisoners of the ability to seek redress for violations of their constitutional protection against cruel and unusual punishment. In light of the Supreme Court's 2012 decision in *Minneci v. Pollard*,[7] prisoners housed in privately-run prisons are barred from bringing suit for violations of their constitutional rights under the Eighth Amendment simply because their jailors happen to be employed by a private company and are thus not considered government actors who can be held legally accountable for Eighth Amendment violations. This Note addresses the legal predicament of federal prisoners who have the misfortune of being assigned to a private prison, and argues for federal legislation that would provide the same rights and protections to all federal prisoners.

At the state level, by contrast, public and private prisoners have superior federal rights through remedies afforded by § 1983 of the Civil Rights Act of 1971,[8] which provides a private right of action for

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4. As used in this Note, government outsourcing, or privatization, means the provision of services or functions that were at one time handled by the government but are now provided or managed by private, commonly for-profit, entities that contract with the government. *See* Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 3 (Jody Freeman & Martha Minow eds., 2009).

5. *See, e.g.*, D. M. Levine, *What's Costlier than a Government Run Prison? A Private One*, CNN MONEY (Aug. 18, 2010, 12:17 PM), http://money.cnn.com/2010/08/17/news/economy/private_prisons_economic_impact.fortune/index.htm ("In recent years, the trend toward privatization, both among state governments and at the federal level has been part of an attempt to address serious budget troubles . . . .").

6. The relevant federal agencies are the Department of Justice's Bureau of Prisons (BOP), the United States Marshals Service (USMS), and the Department of Homeland Security's Bureau of Immigration and Custom Enforcement (ICE). The private, for-profit entities are, most commonly, the GEO Group, Inc. and Corrections Corporation of America. *See infra* Part I.A.

7. 132 S. Ct. 617 (2012).

8. 42 U.S.C. § 1983 (2006) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

constitutional violations committed by state actors.[9] The closest federal law analog, the *Bivens* action[10]—an implied cause of action for a constitutional violation committed by a federal actor in absence of a statutory remedy—is an inferior cause of action because the Supreme Court has not extended it to include actions brought by private prisoners against privately-run prisons and their employees.[11] This federal-state asymmetry is the reason that this Note focuses on the federal system. The proposed reform would impose liability on the federal government that would more closely parallel the state governments' responsibilities toward their prisoners in both public and private prisons.

Part I explores the current status of the privately-run prison system and reviews the legal landscape of prisoners' rights in both public and private prisons at the federal and state levels. Part II explains the problem of asymmetry in the remedies available to federal prisoners in public and private prisons by comparison to those available to state prisoners. Part III proposes legal reform to address these deficiencies. Part IV dispels alternative approaches. Part V discusses the implications of the proposed reform.

I. THE EVOLUTION OF PRIVATE PRISONS AND THE CURRENT LEGAL LANDSCAPE

A. The Special Case of Private Enterprise in the Prison System

The vast increase in the federal prisoner population has resulted in a demand for correctional facilities that has been difficult for the federal government to meet. Consequently, the government has turned to private companies to build and operate prisons to house the growing population of federal inmates.

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rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured.").

9. *See* Alvarez v. Geo Group, Inc., No. SA-09-CV-0299 OG (NN), 2010 WL 743752, at *5 (W.D. Tex. Mar. 1, 2010) (holding that a state prisoner in a county jail operated by the GEO Group had a viable § 1983 claim for a constitutional injury); *infra* Part I.C.2.

10. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

11. *See infra* Part I.C.1 (discussing the *Bivens* remedy and its preclusion for privately-held federal prisoners).

Beginning in the 1970s, the government's "war on drugs"[12] and war on crime have resulted in thousands of additional federal convictions and imprisonments.[13] Today, those convicted of weapons and drug crimes comprise a major portion of all federal prisoners. For example, in 2010, 51 percent of federal inmates were drug offenders,[14] compared with just 30 percent in 1984.[15] At the same time, congressional reform of the federal sentencing regime has caused judges to impose harsher sentences. The Sentencing Reform Act of 1984,[16] which was intended to provide for greater consistency and procedural fairness to federal sentences, in fact led to longer sentences through imposition of mandatory minimums that exceeded the sentences that many federal judges had previously imposed.[17] Similarly, the Anti-Drug Abuse Act of 1986[18] created mandatory minimum sentences for drug crimes that hamstrung judges from showing leniency toward defendants by departing from the suggested statutory sentence. Additionally, the government's "war on terror"[19] led to a significant increase in the federal inmate population as thousands of illegal immigrants were arrested and jailed by U.S. Immigration and Customs Enforcement (ICE). From 1996 to 2009, the number of ICE prisoners more than tripled, and in 2009 alone, over 383,000 immigrants were detained by ICE, costing taxpayers $1.7 billion.[20]

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12. President Richard Nixon coined the term "war on drugs" in a speech in 1971. *See Timeline: America's War on Drugs*, NPR (Apr. 2, 2007, 5:56 PM), http://www.npr.org/templates/story/story.php?storyId=9252490.

13. *See* Matthew W. Tikonoff, Note, *A Final Frontier In Prisoner Litigation: Does* Bivens *Extend to Employees of Private Prisons Who Violate the Constitution?*, 40 SUFFOLK U. L. REV. 981, 983 (2011).

14. PAUL GUERINO, PAIGE M. HARRISON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010 1 (2011), *available at* http://www.bjs.gov/content/pub/pdf/p10.pdf [hereinafter PRISONERS IN 2010].

15. Tikonoff, *supra* note 13, at 986 (citing Judith Greene, *Bailing-Out Private Jails*, *in* PRISON NATION: THE WAREHOUSING OF AMERICA'S POOR 142 (Tara Herivel & Paul Wright eds., 2003)).

16. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at scattered sections of 18 U.S.C. and 28 U.S.C. (1988)).

17. Portraying the view that sentences were not adequate to address the severity of certain crimes, the Sentencing Commission added in § 994(h) of the Sentencing Reform Act that, among its duties, "[t]he Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the *maximum term* authorized." 28 U.S.C. § 994(h) (2006) (emphasis added); *see also generally* Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 STAN. L. REV. 37 (2005).

18. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

19. President George W. Bush coined the term "war on terror" after the September 11, 2001 attacks. *See* President George W. Bush, Address Before a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11 (Sept. 20, 2001).

20. *See* DETENTION WATCH NETWORK, *The Influence of the Private Prison Industry in Immigration Detention*, http://www.detentionwatchnetwork.org/privateprisons (last visited Feb. 1, 2012).

Today, the United States has the highest incarceration rate in the world: over 2.2 million adults—nearly one in every one hundred adults—are behind bars.[21] By proportion, the U.S. prison population far surpasses that of any other developed country—the United States makes up 5 percent of the world's population, but incarcerates 25 percent of the world's prisoners.[22] This is partly due to the fact that the American criminal justice system incarcerates offenders for a wide variety of crimes, some of which are nonviolent. In most Westernized nations, by contrast, such nonviolent crimes are unlikely to result in imprisonment, and, when they do, prison sentences are for far shorter periods of time.[23]

The modern system of incarceration in the United States has created a massive prison population that has fueled a $3 billion private sector prison industry. According to the Department of Justice (DOJ), between 2000 and 2009, the number of federal prisoners in private prisons more than doubled from 15,524 to 34,087.[24] In 2009, 16.4 percent of federal Bureau of Prisons (BOP) prisoners were housed in private facilities.[25] This was ten times higher than the number in 1990.[26] Further, the number of ICE detainees held in private prison facilities increased by 263 percent from 1995 to 2005.[27] The two principal prison contractors are the GEO Group,

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21. *See* LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010 3 tbl.1 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf; THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/one_in_100.pdf.

22. Doris MacKenzie & Douglas Weiss, *Other Countries Have Successfully Reduced Incarceration Rates Without Increasing Crime: We Can Do It!*, 4 VICTIMS & OFFENDERS 420, 420 (2009).

23. *See* Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations'*, N.Y. TIMES, Apr. 23, 2008, at A1; *see also Rough Justice: America Locks Up Too Many People, Some for Acts that Should Not Even Be Criminal*, ECONOMIST.COM (Jul. 24, 2010), http://www.economist.com/node/16640389?Story_ID=16640389 (discussing a shocking case of three Americans who were each sentenced to eight years in prison for importing lobster tails in plastic bags rather than in cardboard boxes, in violation of the Lacey Act). For an interesting article on the deterioration of the American criminal justice system, see James Q. Whitman, *What happened to Tocqueville's America?*, 74 SOC. RES. 251 (2007).

24. *See* HEATHER C. WEST, WILLIAM J. SABOL & SARAH J. GREENMAN, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009 app. tbl.20 (2010), *available at* bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf [hereinafter PRISONERS IN 2009].

25. *Id.* This statistic does not include the federal prisoners held by other federal agencies that also contract with private facilities, such as ICE and USMS.

26. John R. Emshwiller & Gary Fields, *Court Weighs Private Inmates' Rights*, WALL ST. J., Oct. 31, 2011, at A.4 ("More than 26,000 federal prisoners are housed in private prisons, ten times the level of 1990.").

27. Tikonoff, *supra* note 13, at 987 (citing PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2005 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf.

Inc. and Corrections Corporation of America (CCA).[28] CCA was the first to break into the business in 1983,[29] and the GEO Group (then Wackenhut Corrections Corporation) entered shortly thereafter.[30] These two corporations now dominate the private prison market in the United States.[31]

B. Concerns with Outsourcing Prison Management

That the personal safety of inmates is at the mercy of their jailors is proposition that is magnified when viewed through the prism of privatization. As the Legal Aid Society has remarked as amicus: "There are few exercises of government authority more potent than incarceration. In the prison, government power is at its zenith, as the prisoner is entirely dependent upon his jailers to provide for his wellbeing and ensure his survival."[32] A fundamental concern with prison privatization is that the absence of direct government control over incarceration is incompatible with American democratic values of transparent governance and poses a greater threat to the safety of those who are incarcerated.[33]

The notion that the care of those incarcerated is a responsibility of government relates back to the birth of our Nation. In *The Federalist No. 84*, Alexander Hamilton noted that the " 'confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.' "[34] Hamilton was emphasizing due process rights from arrest to sentencing, but these concerns are just as important once the defendant is serving a prison sentence. The government must be accountable for the

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28. *See* JUSTICE POLICY INSTITUTE, GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES 6–7 (2011), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf.

29. *Id.* at 6.

30. *Id.* at 7.

31. *Id.* at 8. As of 2010, CCA operated sixty-six prison facilities under contract with the BOP, ICE and USMS at the federal level, and nineteen states and the District of Columbia; GEO operated 118 prison facilities under contract with all three federal detention agencies as well as thirteen states. *Id.* at 6–8.

32. Brief for The Legal Aid Society of the City of New York as Amicus Curiae Supporting Respondent, Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) (No. 00-860), 2001 WL 826705 at *3.

33. *See, e.g.*, Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005).

34. THE FEDERALIST No. 84, at 474 (Alexander Hamilton) (The Colonial Press ed., 1901) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *136).

safety and wellbeing of those whom it incarcerates, especially because the conditions of confinement are removed from the public eye.

The current increase in prison privatization harkens back to this "less public" system of incarceration that was of concern to Hamilton.[35] Today, government entities—including the BOP, ICE and USMS—are bound by the Freedom of Information Act, the Administrative Procedure Act, and other "government in the sunshine laws."[36] Unlike the government, however, private contractors do not have any such legal obligations to be transparent.[37] As such, they are exempt from public disclosure requirements that would require the government to publish or disclose detailed information on its operations and care for prisoners.[38] In 2011, a bill that would have required private prison entities to make available to the public the same information that federal prison facilities are required to make died in Congress before reaching subcommittee hearings.[39] This was due, in part, to the strong lobbying efforts of CCA in opposition to this and similar bills.[40] Additionally, some private facilities disperse prisoners widely across several states,[41] creating further obstacles to the already challenging task of applying governmental regulations and oversight to private prison operations, due to variances in state laws and the difficulty in tracking and compiling data.

With accountability and transparency thus diminished, private prison corporations, like any for-profit entity, are able to focus on reducing costs and increasing profits. Their business models feed on increasing bed capacity and cutting costs. To encourage the government to sign a contract, these companies must show that they can operate prisons at a lower cost than the government.[42] Cheaper

35. Some level of prison privatization, however, can be traced back to colonial America. *See* Dolovich, *supra* note 33, at 450–54.

36. *See id.*

37. *See* Freeman & Minow, *supra* note 4, at 3 ("[I]n some cases, legal regulations and sanctions simply do not apply to contractors.").

38. *See* Brief for the American Civil Liberties Union, The Legal Aid Society of New York, and the Washington Lawyers' Committee for Civil Rights and Urban Affairs as Amici Curiae Supporting Respondent, Minneci v. Pollard, 132 S. Ct. 617 (2012) (No. 10-1104), 2011 WL 4352227, at *9–10; *cf.* 5 U.S.C. § 552(a)(3)(A) (2006).

39. Private Prison Information Act of 2011, H.R. 74, 112th Cong (2011).

40. CCA registered to lobby against this bill. *See* opensecrets.org (last visited Mar. 4, 2013) (accessed by searching by "Bills" for H.R. 74).

41. *See* CODY MASON, THE SENTENCING PROJECT, TOO GOOD TO BE TRUE: PRIVATE PRISONS IN AMERICA (Jan. 2012), *available at* http://sentencingproject.org/doc/publications/inc_Too_Good_to_be_True.pdf.

42. *See* Dolovich, *supra* note 33, at 459–60. However, it is not empirically clear that private prisons save money; studies produce varying results. In 1996, the U.S. General Accounting Office (GAO) looked into four studies funded by the state and federal governments and determined that the methodologies and results varied across each of the studies,

operations inevitably mean that costly quality standards and safety procedures take a backseat, setting the stage for prison conditions in which violations of constitutional rights go unaddressed. Moreover, these for-profit companies actively lobby for stricter immigration and drug laws and harsher federal sentences.[43] In its 2010 Annual Report, for example, CCA acknowledged that societal efforts to reduce crime rates and other legislation to reduce sentences and allow for early release of inmates based on good behavior are inherent "risk factors" to its business model,[44] effectively stating that business is better when crime is higher.

What does this mean for the inmates housed in private prisons? The cost-cutting focus of private corporations translates to reduced staffing levels,[45] reduced investment in training of prison guards,[46] increased ratios of inmates to correctional officers,[47] and lower wages for private correctional officers.[48] Low pay, poor training, and high turnover may contribute to higher levels of violence in the private sector prisons.[49] This may in turn encourage private prison employees to violate prisoners' rights—rights that would be better

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with two showing no major difference in efficiency between private and public prisons, another study showing that private prisons resulted in only 7 percent savings to the state, and another study finding that the cost of a private facility fell somewhere between the cost of two similar public prisons. *See* MASON, *supra* note 41, at 7.

43. *See* CORRECTIONS CORPORATION OF AMERICA, 2010 ANNUAL REPORT ON FORM 10-K [hereinafter CCA 2010 ANNUAL REPORT], *available at* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDE5MTEwfENoaWxkSUQ9NDMyMjg1fFR5cGU9MQ==&t=1 (discussing lobbying efforts for strict drug laws and harsher sentences); DETENTION WATCH NETWORK, *The Influences of Private Prison Industry in Immigration Detention*, http://www.detentionwatchnetwork.org/privateprisons (last visited Sept. 20, 2012) (discussing lobbying efforts for harsher immigration laws).

44. *See* CCA 2010 ANNUAL REPORT, *supra* note 43, at 19–20 ("The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction or parole standards and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws.").

45. *See* JAMES AUSTIN & GARY COVENTRY, BUREAU OF JUSTICE ASSISTANCE, EMERGING ISSUES ON PRIVATIZED PRISONS 52 (2001) ("[T]he number of staff assigned to private facilities is approximately 15 percent lower than the number of staff assigned to public facilities.").

46. *See* Curtis R. Blakely & Vic W. Bumphus, *Private and Public Sector Prisons—A Comparison of Select Characteristics*, 68 FED. PROBATION 27, 29 (2004). Based on data obtained in 1998, the public sector required 232 hours of "pre-service training" whereas the private sector only required 174 hours. *Id.*

47. *Id.* In 1998, the inmate to correctional officer ratio for the private sector was 6.7:1, whereas it was 5.6:1 in the public sector. *Id.*

48. *Id.* In 1998, private prison corporations paid prison officials between $15,919 and $19,103 while the BOP paid prison officials between $21,246 and $34,004 for comparable work. *Id.*

49. *Id.* at 30. The average correctional officer turnover rate is three times higher in the private sector (43 percent) than in the public sector (15 percent). *Id.* at 29.

safeguarded if the prisoners were guarded by government employees in government-run facilities. This is the predicament of the privately-housed federal prisoner.

One notorious example of the dangers of prison privatization comes from CCA's management of a federal prison facility in Youngstown, Ohio, beginning in 1997. An independent report uncovered that within the first fourteen months of operation, the prison "experienced pivotal failures in its security and operational management."[50] In a speedy effort to increase occupancy and boost profits, CCA had neglected to properly screen incoming prisoners and instead classified maximum-security inmates as medium-security to fill its beds.[51] Consequently, CCA prison guards were unable to control their prisoners. What followed is eye-opening:

> CCA managers employed brutal policies[,] . . . engaged in excessive use of force against prisoners, failed to maintain control over weapons, and failed to implement numerous security procedures. As a result, there were two homicides, numerous stabbings, extreme levels of violence, and six escapes within the first 14 months.[52]

Despite these egregious breaches of security, CCA neglected to conduct an internal investigation until the federal government required it to do so,[53] strongly suggesting that this private prison contractor was largely unconcerned with the safety and security of its prisoners and was instead motivated by increased profits. Certainly in this case, privatization resulted in lax enforcement in safety standards and concern for prisoners' wellbeing.

Although prisoners may not be sympathetic victims, it is important to appreciate that abuse in private prisons is common and can

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50. JOHN L. CLARK, INSPECTION AND REVIEW OF THE NORTHEAST OHIO CORRECTIONAL CENTER (1998) [hereinafter YOUNGSTOWN REPORT], *available at* http://www.justice.gov/ag/youngstown/youngstown.htm. This was an independent report by the Corrections Trustee for the District of Columbia appointed by Attorney General Janet Reno at the request of Ohio Governor George V. Voinovich and the U.S. Congress.

51. *See id.*; *see also* Dolovich, *supra* note 33, at 461.

52. Brief for The Legal Aid Society of the City of New York as Amicus Curiae Supporting Respondent, Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) (No. 00-860), 2001 WL 826705, at *13 (citing YOUNGSTOWN REPORT, *supra* note 50, at 5). In another terrifying example, correctional officers at a private state jail in Texas who "had only forty hours of classroom training, were videotaped 'forcing prisoners to crawl, kicking them, and encouraging dogs to bite them.' " Tikonoff, *supra* note 13, at 989 (citing Editorial, *Prison Privatization is No Panacea*, HARTFORD COURANT, Aug. 24, 1997, at C2).

53. Brief for The Legal Aid Society of the City of New York as Amicus Curiae Supporting Respondent, Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) (No. 00-860), 2001 WL 826705, at *13.

be quite egregious, as evidenced by the preceding CCA example. Such abuse takes a number of troubling forms. For example, females housed in private prisons have been raped by guards;[54] prison guards have physically abused prisoners for failing to follow orders, or for no reason at all;[55] and prisoners have preyed upon other prisoners while guards looked the other way or failed to intervene.[56] Although in some cases these prison guards have grossly abused their *individual* power and acted well beyond the outer limits of their authority, the more troubling reality is that in many situations the abuse of prisoners may stem from the cost-containment *policies* put in place by the private corporations that operate these prisons, resulting in intentional violations of prisoners' rights. Considering that those behind bars already have limited rights, protecting the few rights that they do have is all the more essential. As Justice White declared, "though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country."[57] Ultimately, the type of prison in which a federal prisoner is incarcerated should not affect his ability to protect and defend his fundamental rights.

C. The Current Legal Landscape

Under the current framework, the type of federal prison to which a prisoner is assigned determines the level of federal protections available to that prisoner. An appreciation of the rights that may be abridged by the happenstance of being incarcerated in a privately-run prison first requires an understanding of the legal remedies currently available to publicly-held federal prisoners.

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54. *See, e.g.*, Amended Complaint, Doe v. Neveleff, No. 11-cv-907, 2011 WL 7783507 (W.D. Tex. Dec. 5, 2011) (seeking damages for former inmates sexually assaulted while in ICE custody at a prison operated by CCA).

55. YOUNGSTOWN REPORT, *supra* note 50 (inmates abused by CCA prison guards).

56. Wackenhut Corr. Corp. v. de la Rosa, 305 S.W.3d 594, 600 (Tex. App. 2009) (alleging that an inmate was beaten to death by two other inmates while Wackenhut prison guards just stood by and watched). For a compilation of prisoner abuse cases against CCA, see Project On Government Oversight (POGO), *Federal Contractor Misconduct Database*, http://www.contractormisconduct.org/index.cfm/1,73,221,html?ContractorID=170 (last visited Nov. 26, 2012).

57. Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

1. *Bivens* Actions for Publicly-Held Federal Prisoners

In *Bivens v. Six Unknown Federal Narcotics Agents*,[58] federal agents acting under the color of federal law, unlawfully entered and searched Webster Bivens's apartment in search of drugs. At the time, there was no legal remedy through which Bivens could seek monetary compensation for the officers' actions.[59] The Supreme Court thus created an implied cause of action for a constitutional violation committed by a federal actor in the absence of an existing statutory remedy, in that case applying the action to a Fourth Amendment violation of unreasonable search and seizure. In doing so, the Court created a federal analog to 42 U.S.C. § 1983, which allows individuals to bring suit for constitutional violations committed by state and local government actors.[60]

Almost a decade later, in *Carlson v. Green*,[61] the Supreme Court extended *Bivens* to include Eighth Amendment violations, thereby explicitly providing prisoners with a federal cause of action by which to remedy cruel and unusual punishment. Since then, the *Bivens* action has been the foundation of numerous federal prisoner claims of constitutional violations committed at the hands of government officials in federally-run correctional facilities.

2. The Incarceration of Federal Prisoners Must be Regarded as "Federal Action" to Fall Under *Bivens*

Only government actors can be held responsible for constitutional violations. Thus, prison guards employed by private corporations operating prison facilities under contract with a federal agency—such as the BOP, ICE, or USMS—cannot be sued for alleged constitutional violations unless they are considered to be standing in the shoes of federal officials and "acting under the

58. 403 U.S. 388 (1971).

59. *See id.* at 394. Bivens, acting pro se, brought a civil suit for damages against the federal agents, alleging that his Fourth Amendment right to be free from unreasonable search and seizure was violated. The Second Circuit, affirming the district court, held that "the Fourth Amendment does not provide a basis for a federal cause of action for damages arising out of an unreasonable search and seizure." *Bivens v. Six Unknown Federal Narcotics Agents*, 409 F.2d 718 (2d Cir. 1969). Further, because Bivens consented to the federal agents entering his home, any state tort law claim for trespass was precluded. *Bivens*, 403 U.S. at 394.

60. The Court noted, however, that the *Bivens* action may be defeated in light of "special factors counseling hesitation," including the presence of alternative remedies. *Id.* at 396; *see also infra* Part III.A.

61. 446 U.S. 14 (1980).

color of federal law."[62] It would only seem reasonable for the government to be accountable to those it incarcerates, wherever and however it incarcerates them, whether under the control of public or private prison officials. Thus, as a predicate issue, it is necessary to determine that private federal prison contractors are government actors if we are to prevent the federal government from escaping responsibility for the constitutional rights and wellbeing of its prisoners by merely outsourcing prison management. The Supreme Court has not squarely addressed this issue,[63] but considering its own jurisprudence extending the definition of *state* action to include private entities acting under contract with *state* governments[64] and the strong parallels between *Bivens* actions and § 1983 claims, it is likely that the Supreme Court would agree. As further support, many lower federal courts have already held federal contractors to be government actors within the meaning of *Bivens*.[65]

In *West v. Atkins*, the Supreme Court held that a private doctor operating under contract with a state acts under the color of state law within the meaning of § 1983.[66] There, a prisoner brought a § 1983 claim against a private doctor who was operating under contract with North Carolina to provide medical services to prisoners in a state-run prison hospital. The prisoner alleged that the doctor provided grossly inadequate medical care in violation of his Eighth Amendment rights.[67] The Court held that the contractual nature of

62. Pollard v. GEO Grp., Inc., 629 F.3d 843, 854, 858 (9th Cir. 2010).

63. This issue was not reviewed by the Supreme Court in *Minneci v. Pollard* as the petitioners did not seek the Court's review of the Ninth Circuit's finding of federal action. *See* Brief of Petitioners-Appellants at 37 n.8, Minneci v. Pollard, 132 S. Ct. 617 (2012) (No. 10-1104), 2011 WL 3017399 at *11.

64. *See infra* note 66 and accompanying text.

65. *See* Pollard v. GEO Grp., Inc., 629 F.3d 843, 854, 858 (9th Cir. 2010) (concluding that GEO employees can be considered federal agents acting under color of federal law); Alba v. Montford, 517 F.3d 1249, 1254 (11th Cir. 2008) (assuming, without deciding, that officials in privately operated prisons are government actors for purposes of *Bivens* liability); Sarro v. Cornell Corrections, Inc., 248 F. Supp. 2d 52, 61 (D.R.I. 2003) (holding that private prison guards are "federal actors within the meaning of *Bivens*."). *But see* Holly v. Scott, 434 F.3d 287, 293 (4th Cir. 2006) (private prison officials operating federal prisons are not federal actors for the purpose of *Bivens* liability). Even the GEO Group has conceded, while defending itself in federal district court, that it operates "under color of federal law" in regard to the confinement of its *federal* prisoners. *See* Alvarez v. GEO Grp., Inc., No. SA-09-CV-0299, 2010 WL 743752, at *2 (W.D. Tex. Mar. 1, 2010). There, a federal prisoner housed in a Texas county jail operated by the GEO Group filed a § 1983 action alleging violations of her Eighth Amendment rights after her fingers were caught in a steel door and severed, as the result of her guards' abuse. *Id.* at *1. In its defense, the GEO Group proffered that it "cannot be sued under section 1983 because it acted under color of federal law rather than under color of state law as required for a section 1983 claim." *Id.* at *2.

66. 487 U.S. 42, 54 (1988).

67. *Id.* at 45.

the doctor's employment did not absolve the state of liability, reasoning that the decision to contract out prison medical care "does not relieve the State of its constitutional duty"[68] to provide adequate medical care to inmates. Although the state may choose to delegate its responsibilities to private actors, the court concluded that the state remains obligated to ensure that adequate care is provided, and should be found liable if it is not.[69] Thus, the court held that the actions of the private doctor must be considered state action because he was exercising power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[70] After all, in the prison environment, if the state does not deliver adequate medical care, the prisoner has nowhere else to turn.[71]

There is no compelling reason for the Supreme Court not to extend the logic of *West v. Atkins* to private actors operating under contract with the *federal* government. Prison guards working in private federal prisons are exercising powers that they possess only by virtue of their employers' contracts with the federal government. The government should not be permitted to abrogate its responsibility to protect those for whom it has compelled into its own care simply by outsourcing the management of its prison facilities. In sum, considering Supreme Court precedent regarding *state* action in prison operations, as well as lower federal court precedent, it is not unreasonable to consider private federal contractors to be operating in the shoes of federal government officials and under the color of federal law.

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68. *Id.* at 56.

69. *Id.* at 55–56.

70. *Id.* at 49 (internal citations omitted).

71. Some circuits also have found state action in § 1983 claims against private prison *corporations*. For example, the Sixth Circuit has held that a private entity operating a state corrections facility can be sued under § 1983. Skelton v. Pri-Cor, Inc., 963 F.2d 100 (6th Cir. 1991). The court relied on the fact that the corporation was "performing a public function traditionally reserved to the state." *Id.* at 102. The court reasoned that "the power exercised by [the private prison-management company] is 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *Id.* (quoting West v. Atkins, 487 U.S. 42, 49 (1988)). The Fifth Circuit has similarly held that the "confinement of wrongdoers—though sometimes delegated to private entities—is a fundamentally governmental function. These corporations and their employees are therefore subject to limitations imposed by the Eighth Amendment." Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir. 2003).

3. Current Federal Remedies Available to Prisoners

Under current law, the type of prison to which a prisoner is assigned dictates the extent to which the prisoner is able to seek remedies for violations of his constitutional rights. A federal prisoner housed in a prison managed by the government is currently able to bring a *Bivens* action against individual correctional officers who violate his constitutional rights.[72] This federal prisoner, however, is barred from suing the federal government directly.[73]

A federal prisoner housed in a privately-run prison, on the other hand, cannot bring a *Bivens* action against prison officials because his claim is against employees of a private company rather than of the federal government.[74] The prisoner is likewise barred from seeking federal remedies against the prison facility itself.[75]

By comparison, state prisoners benefit from more uniform federal remedies. A state prisoner housed in a publicly-run prison may seek federal remedies for constitutional violations by an individual correctional officer under § 1983.[76] This prisoner would be unable to seek federal remedies against the state prison itself.[77] Unlike federal prisoners, however, a state prisoner in a privately-run state prison may be able to seek federal remedies against private prison officials[78] and against the private prison itself.[79] For ease of reference, the variations in the federal remedies available based on the category of prisoners can be charted as follows:

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72. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971); *see infra* Part II.B.1.

73. FDIC v. Meyer, 510 U.S. 471, 484–86 (1994) (declining to extend the *Bivens* action in a suit against a federal agency).

74. Minneci v. Pollard, 132 S. Ct. 617 (2012).

75. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63, 74 (2001) (prohibiting a *Bivens* action against a private federal prison corporation).

76. 42 U.S.C. § 1983 (2006).

77. This type of action is precluded by the Eleventh Amendment. *See* Quern v. Jordan, 440 U.S. 332, 345 (1979). However, different principles apply to constitutional violations in prisons run by municipal or local governments. Unlike the States, municipal governments can face § 1983 liability resulting from their official policies, customs, or practices. *See* Monell v. Dep't. of Social Serv. of N.Y., 436 U.S. 658, 691 (1978).

78. Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir. 2003) (allowing a § 1983 suit against employees of a private prison corporation).

79. Lugar v. Edmondson Oil Co., 457 U.S. 922, 941–42 (1982) (allowing a § 1983 suit against a private corporation acting "under the color of state law").

TABLE 1. WHEN DOES A PRISONER HAVE A FEDERAL REMEDY FOR A CONSTITUTIONAL VIOLATION?[80]

	Correctional Officer	Correctional Facility
State Level		
Public	Yes	No
Private	Yes	Yes
Federal Level		
Public	Yes	No
Private	No	No

This chart depicts the asymmetries in remedies available to different types of prisoners. The problem with this asymmetry is discussed in detail below.

II. THE REMEDY GAP: ASYMMETRIC REMEDIES FOR FEDERAL PUBLICLY-HELD AND PRIVATELY-HELD PRISONERS

Prisoners may be a marginalized and largely unpopular demographic, but this does not mean that their constitutional right to be free from cruel and unusual punishment does not warrant protection. Yet today, not all federal prisoners benefit from the same remedies in the face of a constitutional transgression. As a result of the January 10, 2012 United States Supreme Court decision in *Minneci v. Pollard*,[81] an asymmetry now exists between the remedies available to publicly-held federal prisoners and privately-held federal prisoners. This asymmetry offends our long-founded notions of fairness in that an action that offends our federal Constitution must be protected by a uniform remedy that applies to all those who suffered the infringement at the hands of a federal actor. As the Supreme Court expressed in *Carlson v. Green*:

> [I]t is obvious that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules. The question whether [the prisoner's] action for violations by federal officials of federal constitutional rights

80. Peoples v. CCA Det. Ctrs., 422 F.3d 1090 (10th Cir. 2005), *vacated in part and aff'd in part by equally divided court*, 449 F.3d 1097 (10th Cir. 2006) (en banc) (per curiam).

81. 132 S. Ct. 617 (2012).

> should be left to the vagaries of the laws of the several States admits of only a negative answer . . . .[82]

A review of *Minneci v. Pollard* and the Ninth Circuit decision that it overturned, which follows, is crucial to understanding the legal predicament of privately-held federal prisoners and why a uniform federal reform is needed.

A. The Supreme Court Denies Bivens *Action to Federal Prisoners in Private Prisons*

Until recently, there was a circuit split as to whether a prisoner in a privately-run federal prison could bring a *Bivens* action against an individual prison official for an Eighth Amendment violation. In *Pollard v. The GEO Group, Inc.*,[83] the Ninth Circuit allowed a privately-held federal prisoner alleging a violation of his Eighth Amendment right to bring a *Bivens* action, creating a split with the Fourth,[84] Tenth,[85] and Eleventh Circuits.[86] The Supreme Court resolved the circuit split by reversing the Ninth Circuit and denying an extension of *Bivens* to all privately-held prisoners. This decision leaves prisoners like Pollard subject to the inconsistencies of state tort law and conditions the availability of relief for a violation of a federal constitutional right to the forum where the prisoner is incarcerated. This is problematic because a violation of a federal constitutional right should be met with a uniform federal remedy.

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82. 446 U.S. 14, 23 (1980) (internal citations omitted).

83. 629 F.3d 843 (9th Cir. 2010).

84. Holly v. Scott, 434 F.3d 287 (4th Cir. 2006). Holly, housed in a federal prison operated by the GEO Group, alleged that the guards provided him with inadequate medical care in violation of his Eighth Amendment right. The court denied Holly's *Bivens* action on the grounds that the GEO Group employees were not government actors who could be held liable for constitutional violations and that Holly had causes of action only under state tort law. *Id.* at 290–95.

85. Peoples v. CCA Det. Ctrs., 422 F.3d 1090 (10th Cir. 2005). Peoples, housed in a federal prison operated by CCA under contract with the U.S. Marshals Service (USMS), filed a *Bivens* action against CCA guards for failure to protect him from repeated physical attacks by other prisoners. A split panel of the Tenth Circuit held that Peoples could not bring a *Bivens* action against the CCA employees because a Kansas negligence tort action was available. *Id.* at 1101.

86. Alba v. Montford, 517 F.3d 1249, 1251 (11th Cir. 2008). Alba, a federal prisoner housed at a prison operated by CCA under contract with the BOP, alleged that he suffered from complications after surgery. Alba alleged that he was denied post-operative treatment because, under CCA policy aimed at cutting costs, the treatment was "elective" and not necessary. *Id.* at 1251. The district court reasoned that Alba had adequate state court remedies and denied the *Bivens* action. The Eleventh Circuit affirmed. *Id.* at 1255.

A review of *Minneci* and its application illustrates this deficiency and the need for remedial legislation.

1. *Pollard v. The GEO Group, Inc.*[87]

In 2002, Richard Lee Pollard, proceeding pro se, filed a *Bivens* action seeking relief from abuse he had suffered while housed as an inmate at the Federal Correctional Institution in Taft, California, operated by Wackenhut (now the GEO Group).[88] While working in the prison's butcher shop, Pollard slipped on a "haphazardly" placed cart and fractured both of his elbows.[89] Two days later, Pollard was taken to an outside orthopedist for medical treatment.[90] The prison guards required that Pollard wear a special restraining jumpsuit and a "black box" (mechanical restraints around his wrists) during transport and while at the doctor's office, despite Pollard's complaints of "excruciating pain" from the jumpsuit and "severe pain" from the black box restraints.[91] The orthopedist x-rayed Pollard's arms, diagnosed Pollard with fractured elbows, and recommended that his arms be placed in a bilateral sling and that he refrain from manual work.[92] Once back at the prison, the guards told him that "due to limitations in staffing and facilities," he would not be provided with a splint, against doctor's orders.[93] Pollard was unable to bathe or eat, and he received no medical attention or alternative means to care for himself.[94] Also against doctor's orders, prison guards forced Pollard to continue manual labor.[95]

The district court dismissed Pollard's action against the Wackenhut employees for failing to state a colorable *Bivens* claim. The court reasoned that he had superior remedies through state tort law and that the prison officials were not federal actors subject to *Bivens* liability.[96] On appeal, the Ninth Circuit reversed the district

87. 629 F.3d 843, 851 (9th Cir. 2010).

88. Pollard v. Wackenhut Corr. Corp., No. CV F 01 6078 OWW, 2006 WL 2661111, at *1 (E.D. Cal. Sept. 14, 2006).

89. *Id.* at *1.

90. *Id.*

91. Pollard v. GEO Group, 629 F.3d 843 (9th Cir. 2010).

92. *Id.*

93. *Id.*

94. *Id.* at 851.

95. *Id.*

96. Pollard v. Wackenhut Corr. Corp., No. CV F 01 6078 OWW, 2006 WL 2661111, at *3, *4 (E.D. Cal. Sept. 14, 2006).

court's decision and extended *Bivens* liability to claims against private prison guards whose employers were operating under contract with the federal government.[97] The court held that the GEO employees acted under the color of federal law for purposes of *Bivens* liability, state tort remedies were insufficient to foreclose the plaintiff's ability to seek *Bivens* remedies, and there were no "special factors counseling hesitation" in allowing the *Bivens* suit to proceed.[98]

2. *Minneci v. Pollard*

On appeal to the Supreme Court, in an eight-to-one decision reversing the Ninth Circuit, the Court held that *Bivens* does not extend to prisoners in Pollard's situation because Pollard's claim "focuses upon a kind of conduct that typically falls within the scope of traditional state tort law."[99] The Court applied the two-part test established in *Wilkie v. Robbins*[100] for determining whether to recognize a *Bivens* remedy: first, the court must determine whether there are any alternative existing processes for protecting the constitutionally-recognized right at issue; second, the court must consider whether there are any "special factors counseling hesitation" before authorizing a new kind of federal litigation.[101] In applying this test, the Court relied primarily on the fact that Pollard, due to his status as a privately-held prisoner, had the option—not available to publicly-held prisoners—of proceeding under a state tort law claim, making a *Bivens* action unnecessary.[102] In doing so, the Court distinguished Pollard's case from that of the prisoner in *Carlson v. Green*[103] (housed in a government-run prison), and concluded that

97. Pollard v. GEO Group, 629 F.3d 843 (9th Cir. 2010).

98. *Id.* at 868.

99. Minneci v. Pollard, 132 S. Ct. 617, 623 (2012) ("And in the case of a privately employed defendant, state tort law provides an 'alternative, existing process' capable of protecting the constitutional interests at stake."). Publicly-held prisoners, on the other hand, cannot bring state tort law actions against employees of the federal government, because the Westfall Act substitutes the United States as defendant in common law tort actions against federal employees. *See* 28 U.S.C. §§ 2671, 2679(b)(1) (2006). A number of statutes allow claims against the federal government, but not for constitutional violations. *See infra* Part II.B.2.

100. 551 U.S. 537, 541 (2007).

101. *See Minneci*, 132 S. Ct. at 623 (citing *Wilkie*, 551 U.S. at 550).

102. *Id.* (citations omitted) ("Prisoners ordinarily cannot bring state-law tort action against employees of the federal government. But prisoners ordinarily can bring state-law tort actions against employees of a private firm.").

103. 446 U.S. 14 (1980) (extending *Bivens* to prisoners' claims against federal prison officials for Eighth Amendment violations).

tort law of the forum state provided an adequate remedy for a privately-held prisoner.[104]

Dissenting, Justice Ginsburg argued that Pollard's *Bivens* claim should proceed despite the presence of a state tort law action.[105] Justice Ginsburg considered the lack of uniform remedies between public and private prisoners troubling, and refused to "deny the same character of relief to . . . a prisoner placed by federal contract in a privately operated prison."[106] Rather, she declared that she "would hold his injuries, sustained while serving a federal sentence, 'compensable according to uniform rules of federal law.' "[107] Applauding Justice Ginsburg's view, this Note argues that it is contrary to our sense of justice and fairness for constitutional violations to be addressed solely through varying state tort remedies.

B. Deficiencies in the Remedies Currently Available to Privately-Held Federal Prisoners

Federal prisoners housed in privately-run prisons are disadvantaged in terms of available remedies for federal constitutional violations. In light of *Minneci*, privately-held federal prisoners cannot seek federal redress for violations of their federal constitutional rights through *Bivens* actions. The seemingly arbitrary decision to place a prisoner in a private prison effectively strips that prisoner of the ability to enforce his Eighth Amendment right, which would otherwise be protected if the prisoner had been assigned to a government-run prison. This Part details how the alternative remedies that are available to privately-held federal prisoners are inadequate.

1. Forum State Tort Law for Privately-Held Federal Prisoners Provides Inconsistent and Inadequate Relief

Although publicly-held federal prisoners may pursue *Bivens* actions, the Supreme Court's holding in *Minneci* leaves those in privately-run prisons to "the 'vagaries' of state tort law."[108] State tort law should not be regarded as a sufficient alternative to *Bivens*, nor should it impede the implementation of uniform federal reform,

104. *Id.*
105. *Minneci*, 132 S. Ct. at 627 (Ginsburg, J., dissenting).
106. *Id.*
107. *Id.* (citations omitted).
108. *Id.* at 627 (Ginsburg, J., dissenting) (citations omitted).

because the vindication of a federally-protected right should not be subject to a state decision on whether to recognize that right.

Violations of constitutional rights cannot be adequately remedied by state tort claims. As one federal district court has remarked, "making the federal remedies available to a federal prisoner at a privately-operated institution contingent upon whether there are adequate alternative state law remedies would require a case-by-case analysis of state law," which "would cause the availability of a *Bivens* remedy to vary according to the state in which the institution is located, a result that *Bivens*, itself sought to avoid."[109] Rather, in the face of a *federal* constitutional violation, it is only fair that such infringement be met with a uniform *federal* remedy created by the federal government.[110] It is, in fact, the federal government, rather than the states, that has traditionally borne the primary responsibility for protecting individuals' civil rights.[111]

Furthermore, state tort law is not always capable of providing an adequate remedy for violations of prisoners' Eighth Amendment rights.[112] Even if state tort law is capable of providing relief, there remains no clear or consistent application of law. State tort law was developed to address allegations of harm between private individuals, whereas constitutional law addresses the interaction between private individuals and their government.[113] This difference in legal doctrine makes it less likely that state tort law will be able to adequately remedy constitutional violations.[114] Indeed, it is possible that a constitutional violation would not amount to a tort under the forum state's laws. For example, denying a prisoner access to a toilet for many hours is an Eighth Amendment violation, but does not necessarily constitute a common law tort.[115] By the very nature of its purpose and function, incarceration imposes psychological and emotional distress that may not necessarily be tied to physical harm—an element that is generally required by state tort law. Further, a prisoner's treatment may amount to an Eighth Amendment violation as a result of a combination of factors establishing cruel

109. Sarro v. Cornell Corrs. Inc., 248 F. Supp. 2d 52, 63 (D.R.I. 2003).

110. *See* Carlson v. Green, 46 U.S. 14, 23 (1980) ("[I]t is obvious that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules.").

111. *See* John F. Pries, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 734 (2008) (discussing the establishment of the Civil War amendments).

112. *See id.* at 723, 752. Despite the fact that constitutional tort law borrows some principles from tort law to fill gaps, the actual substance of constitutional tort law is different. *Id.* at 725.

113. *See id.* at 749.

114. *See id.*

115. *See id.* at 753.

and inhumane treatment, each of which on its own may not amount to an actionable tort under state law.[116]

Admittedly, the circumstances in which a constitutional right is violated but no tort is committed may be rare. And it must be conceded that constitutional torts require that a plaintiff show that the defendant acted with "deliberate indifference"[117]—a higher burden than the typical tort law standard of negligence. Even if a state tort law claim can be established, state tort remedies might not be adequate or consistently applied by and among the states.

In particular, a state might limit tort remedies by placing caps on damages or prohibiting recovery for emotional distress that is not connected to a showing of physical harm, thereby providing a plaintiff with less generous recovery than he would have been able to receive under *Bivens*. For example, California prohibits tort plaintiffs from recovering for pre-death pain and suffering and limits non-economic damages to $250,000.[118] This is just one example of the variations in state tort law.

Furthermore, state tort law may subject plaintiffs to additional and burdensome procedural obstacles, such as requiring the plaintiff to first use expert administrative panels in medical malpractice cases[119]—a burden not imposed in *Bivens* actions. The Supreme Court conceded as much in *Minneci*.[120] Although these procedural limitations do not strike at the heart of the plaintiff's claim, they are nonetheless important barriers to relief, given the limited rights of a prisoner and the already significant challenges that prisoners face in bringing their claims.

Finally, leaving the vindication of an Eighth Amendment violation to the operation of state tort remedies could lead to a race to the bottom if private entities choose to relocate prisoners to states with tort laws that are less protective of prisoners' rights.[121]

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116. *See* Wilson v. Seiter, 501 U.S. 294, 304 (1991) ("*Some* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets."); *see also* Pollard v. GEO Group, 629 F.3d 843, 864 (9th Cir. 2010).

117. *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976).

118. *See* CAL. CIV. CODE § 377.34 (West 2004) (limiting Wrongful Death damages to only damages suffered prior to death); CAL. CIV. CODE § 3333.2 (West 1997) (limiting non-economic damages in cases of medical negligence to $250,000).

119. Minneci v. Pollard, 132 S. Ct. 617, 625 (2012) (referencing ME. REV. STAT. ANN., tit. 24 § 2853 (Supp. 2010)).

120. *Id.*

121. This is a possible outcome, considering that private prison corporations can transport prisoners across state lines. *See* MASON, *supra* note 41, at 3.

For all of these reasons, compelling an infringement of a federal constitutional right to be addressed by varying state remedies offends our deep-rooted principles that a federal constitutional violation should have an appropriate uniform federal remedy.[122]

2. The Federal Tort Claims Act

The Federal Tort Claims Act (FTCA) is an additional legal remedy available to federal prisoners. Enacted in 1946, long before the *Bivens* action was created, the FTCA waived the federal government's sovereign immunity and allowed individuals to sue the government for common law torts.[123] After the *Bivens* action was created in 1971, two important amendments to the FTCA were instituted. First, in 1974, the FTCA was expanded to allow for individuals to sue the federal government for intentional law enforcement torts committed by federal officers, such as assault, battery, and false imprisonment.[124] The FTCA, however, did not allow the federal government to be substituted as the defendant for claims sounding in constitutional tort.[125] From this, it was clear that Congress did not intend for the FTCA to replace *Bivens*, but rather to function as complementary causes of action, retaining the right of an individual to sue a government official for a constitutional claim through *Bivens*.[126] Second, as further amended in 1988 by the

122. *See, e.g.*, Bell v. Hood, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts be will alert to adjust their remedies so as to grant the necessary relief."). The *Bell* Court found federal jurisdiction over plaintiffs' allegations that federal agents violated their Fourth and Fifth Amendment rights when their homes were unlawfully searched and they were unreasonably detained. The defendants argued, unsuccessfully, that the plaintiffs stated only a cause of action for trespass, actionable only under state tort law. *Id.* at 680. The *Bell* Court laid the initial foundation for the holding in *Bivens*.

123. 28 U.S.C. § 1346(b) (2006) ("[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.").

124. *Id.* § 2680(h).

125. *See* Cornelia T. L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65, 73 n.39 (1999) ("Constitutional claims . . . cannot be brought under the FTCA.").

126. S. Rep. No. 93-588, at 3, S. Rep. No. 588, (1974), *reprinted in* 1974 U.S.C.C.A.N. 2789 ("[Section] 2680(h) thus contemplates that victims of . . . intentional wrongdoing . . . shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights."). Congressional intent is also evident from Congress's rejection of a Department of Justice proposal that would

Westfall Act,[127] the FTCA allows the federal government to be substituted as defendant for common law torts of its officers acting within the bounds of their employment.[128] Thus, federal government officials are virtually immunized from any common law tort liability, as the Westfall Act mandates that the FTCA be the "exclusive" remedy for common law torts.[129] This exclusivity rule, however, does not apply to claims for constitutional torts, thereby preserving the *Bivens* action.[130]

The FTCA, however, has proven to be a weak channel through which to vindicate constitutional violations. As the Supreme Court stated in *Carlson v. Green*, the FTCA alone "is not a sufficient protector of the citizens' constitutional rights."[131] Indeed, the FTCA is inferior to *Bivens* in several key respects. First, the FTCA does not provide for punitive damages.[132] This can prove important in a case where prisoners cannot prove significant compensable loss due to injury, but can show an intentional, malicious violation of their constitutional rights.[133] Second, the FTCA is still subject to variations in state tort law.[134] Thus, just as with forum state tort law, the FTCA remains too varied to provide uniform relief, which is what is required in the face of a constitutional violation; the opportunity to vindicate such a transgression must not depend on the state in which the harm occurred.

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have substituted the federal government in as the defendant for constitutional torts. *See* Jack Boger, Mark Gitenstein & Paul R. Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. REV. 497, 510–11 (1976) (discussing the Department of Justice's proposal). The Supreme Court has endorsed the view that the two actions should proceed together. *See* Carlson v. Green, 446 U.S. 14, 23 (1980) ("[W]ithout a clear congressional mandate we cannot hold that Congress relegated respondent exclusively to the FTCA remedy.").

127. Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified in scattered sections of 28 U.S.C.).

128. 28 U.S.C. § 2679(b)(1) (2006).

129. *Id.* § 2679(b)(2)(B).

130. *Id.* § 2679(b)(2)(A); *see* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 122 (2009).

131. 446 U.S. 14, 23 (1980).

132. 28 U.S.C. § 2674 (2006) ("The United States . . . shall not be liable for . . . punitive damages."). By contrast, punitive damages may be awarded in a *Bivens* suit. *Carlson*, 446 U.S. at 22. Additionally, punitive damages are available in " 'a proper' " § 1983 claim. *Id.* at 22. This lack of punitive damages is significant in that our " 'constitutional design' would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression." *Id.* (citing Butz v. Economou, 438 U.S. 478, 504 (1978)).

133. *See* Carey v. Piphus, 435 U.S. 247, 257, n.11 (1978).

134. 28 U.S.C. § 1346(b)(1) (2006) (noting that the applicable law will be "in accordance with the law of the place where the act or omission occurred").

III. PROPOSED CURATIVE LEGISLATIVE REFORM

Government outsourcing of prison operations is undoubtedly here to stay. With an expanding prison population and limited resources,[135] the federal government simply cannot run all correctional facilities itself, and a ban on all outsourcing is not a realistic solution. Hand-in-hand with the trend toward outsourcing, however, should come statutory reform that would protect the constitutional rights of federal prisoners wherever they may be incarcerated and create incentives for the federal government to better police the private facilities where it sends its prisoners.

This Note proposes legislation that would create a uniform statutory remedy available to all federally-incarcerated prisoners. This reform would be more consistent with the remedies available to state prisoners under § 1983.[136] Considerations of due process and equal protection require the federal government to protect its federal prisoners by providing a remedy that is available equally and uniformly to all prisoners. Significantly, support for this proposal may be found not only in Justice Ginsburg's dissent in *Minneci*, but also in the Supreme Court's reasoning in *Carlson v. Green*.[137]

In this spirit, this Note's proposed reform would create a uniform federal remedy and narrow the remedial gap between public and private federal prisoners by holding the federal government directly liable for constitutional violations committed by individual correctional officers employed by either the government or by government contractors. Both are, in effect, acting under the color of federal law.[138] Moreover, as discussed below, this reform would be more effective than merely extending *Bivens*, which has proven to be an "unfulfilled promise" in important respects.[139] Exact symmetry between the state and federal governments would not be a certainty, as differences between the remedies available against the two levels of government would still apply. Section 1983 provides both public and private state prisoners with a federal right of action

135. *See supra* Part I.A.

136. *See* Robert T. Numbers & Lisa L. Dixon, *A Return to "the Heady Days"? The Supreme Court Addresses Whether the* Bivens *Doctrine Should Extend to Employees of Government Contractors in* Minneci v. Pollard, 12 ENGAGE, Nov. 2011, at 47, 52 (2011), *available at* http://www.fed-soc.org/doclib/20120112_Engage12.3.pdf ("Ultimately, the only way the asymmetrical liability issue can be addressed, barring some wholesale change in the law, is if Congress addresses the issue.").

137. 446 U.S. 14, 23 (1980) (reasoning that the FTCA is not a replacement for the *Bivens* action because recovery under the FTCA is contingent on the law of the state in which the violation occurred and thus is not adequate for a Constitutional violation).

138. *See supra* Part II.A.

139. *See generally* Perry M. Rosen, *The* Bivens *Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337 (1989) (discussing the limitations and low success rates of *Bivens* actions).

against the *individual* state actor who committed a constitutional violation, whereas this proposal holds the *federal government* responsible for all violations proved by federal prisoners. The two forms of liability, however, adequately parallel one another by bringing the remedies available to all federal prisoners—in both public and private facilities—closer to the level of protection already afforded to state prisoners under § 1983.

Remedial legislation would provide in substance as follows:

> The district courts shall have jurisdiction over actions brought against the federal government by federally incarcerated persons for violations of the Constitution of the United States, for injunctive relief or monetary damages, or for injury to person or death, caused by an employee of the Government or of a private entity operating with federal authority and under contract with the Government. Any law to the contrary shall be of no further force or effect.

This model statute would become part of Title 28 of the United States Code. This proposal would effectively abrogate 28 U.S.C. § 2679(b)(2), which currently prohibits FTCA claims based on the Constitution or federal statutes,[140] and § 2671, which expressly excludes from liability "any contractor with the United States."[141] This law would also permit punitive damages.

This proposed statute builds on the FTCA, which allows private individuals to sue the federal government *only* for common law torts and intentional law enforcement torts committed by individuals acting on the government's behalf.[142] This reform rejects the FTCA's reliance on *Bivens* as the sole remedy for a constitutional tort and instead allows plaintiffs to substitute the federal government as the defendant in actions alleging constitutional violations by government-sponsored officials. There has been support for such direct governmental liability in the past: the DOJ has proposed legislation that would substitute the government as the defendant in a constitutional tort case against government officials, but the proposal was rejected by Congress.[143]

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140. *See also* FDIC v. Meyer, 510 U.S. 471, 477–78 (1994) (holding that a constitutional tort does not lie under § 1346(b) of the FTCA). This case would also be overturned by this legislation.

141. 28 U.S.C. § 2671 (2006).

142. *See supra* Part II.B.2.

143. *See* Pfander & Baltmanis, *supra* note 130, at 135 (noting that in the 1970s the Department of Justice proposed to "make an explicit provision for the assertion of constitutional claims against the government itself"). This proposal arose out of Congressional concern

This reform places liability directly on the federal government, in direct contrast to the individual liability model on which prisoners' *Bivens* claims are based. In practice, however, this proposal would not radically depart from *Bivens* (in terms of increasing government monetary liability), as the federal government already indemnifies virtually all of its employees.[144] *Bivens* imposed liability on the individual federal actor under the theory that it would deter those individuals from committing constitutional violations, as they would be personally liable for judgments entered against them.[145] In reality, however, there is no clear division between individual and government liability.[146] Rather, the federal government becomes the de facto defendant in most *Bivens* actions, because almost without exception, the government provides the federal official accused of committing the constitutional violation with legal representation and pays the cost of either the judgment or settlement of the claim.[147]

That federal indemnification is so common in *Bivens* actions makes this reform—placing liability directly on the government—a workable change that in reality will not add substantially to the liability that the federal government currently accepts. Inasmuch as private prison officials are supervising federal prisoners by virtue of the authority vested in them as federal surrogates, the government is benefiting from their actions. Thus, it is appropriate to hold the government directly accountable when those actors abuse their power—and the prisoners under their charge. This rings true particularly in the context of private prison corporations, where intentional corporate efforts to cut costs have often resulted in violations of the standards of care that prison officials should afford their federal prisoners.[148] These are systemic problems beyond the control of an individual government employee, and the government itself should feel the pressure to improve policies and procedures of prison corporations if it is going to benefit from outsourcing prison management to them. Current statutes, however,

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over a number of no-knock drug raids by federal agents on private homes and that the *Bivens* action might not be providing enough deterrent. *Id. See also supra* note 126.

144. Pillard, *supra* note 125, at 78 ("[S]ettlements or judgments are paid from government coffers.").

145. F.D.I.C. v. Meyer, 510 U.S. 471, 485 (1994) ("It must be remembered that the purpose of *Bivens* is to deter the *officer*.") (emphasis added).

146. *See* Pillard, *supra* note 125, at 67.

147. *Id.*

148. *See supra* Part I.A.

provide the federal government with immunity from such constitutional tort suits and thus little incentive to institute such reparative changes.

Given the effects of government indemnification, the further diminution of government deterrence through the outsourcing of incarceration, and the asymmetrical remedies afforded federal and state prisoners, this legislative reform is sorely needed.

IV. REJECTING THE ALTERNATIVE OF EXTENDING *BIVENS* AS APPROPRIATE REFORM

In 1971, the Supreme Court used *Bivens* to fill a remedial gap, motivated by the fundamental principle of American jurisprudence that every legal injury should have a legal remedy.[149] From the start, *Bivens* was a controversial holding.[150] Until the recent Supreme Court decision in *Minneci*, which clamped down on the extension of *Bivens* to cover claims against private prison contractors for the federal government, various commentators argued that *Bivens* should be extended to privately-held federal prisoners.[151]

An extension of *Bivens* to cover privately-held federal prisoners, however, would create a less comprehensive reform than would the proposed legislation. Over the past four decades, *Bivens* has been unsuccessful in plugging the remedial gap—not only in assuring the right to be free from unconstitutionally harsh treatment wherever incarcerated, but also in serving as a deterrent to jailers who may abuse prisoners.[152]

In practice, plaintiffs rarely prevail on a *Bivens* claim in court and thus rarely succeed in reaching advantageous settlements.[153] Unlike

149. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971). As Justice Marshall declared in *Marbury v. Madison*, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." 5 U.S. 137, 163 (1803).

150. *See Bivens*, 403 U.S. at 411–12 (Burger, C.J., dissenting); *see also* Pfander & Baltmanis, *supra* note 130, at 117–18 (discussing scholarly criticism of *Bivens*).

151. *See, e.g.*, Tikonoff, *supra* note 13.

152. The Supreme Court has refused to extend *Bivens* claims in each of the several opportunities it has had since 1980. *See* Minneci v. Pollard, 132 S. Ct. 617, 626 (2012); *see also* Schweiker v. Chilicky, 487 U.S. 412 (1988) (rejecting a Bivens action against a federal agency for alleged Fifth Amendment due process); F.D.I.C v. Meyer, 510 U.S. 471 (1994) (same).

153. Ryan D. Newman, *From* Bivens *to* Malesko *and Beyond: Implied Constitutional Remedies and the Separation of Powers*, 85 TEX. L. REV. 471, 474–75 (2006). Between 1971 and 1985, only thirty out of more than 12,000 filed *Bivens* suits resulted in judgments on behalf of plaintiffs; among these thirty, only four federal defendants actually ended up paying out their judgments. *Id.* at 475 (citing Rosen, *supra* note 139, at 343). Although these statistics are dated, more recent data is unlikely to differ significantly.

§ 1983 claims, which are "presumptively available,"[154] the availability of a *Bivens* claim is initially subject to the idiosyncrasies of a case-by-case analysis[155]—a problem in that it introduces an intolerable "layer of uncertainty into constitutional litigation."[156] A *Bivens* claim first must overcome two obstacles that impede its availability to plaintiffs: the court must determine whether (a) there is any "alternative, existing process for protecting the interest [that] amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages";[157] or (b) whether there are "special factors counseling hesitation before authorizing a new kind of federal litigation."[158] These two obstacles were distilled into a two-part test in *Wilkie v. Robbins.*[159] Thus, even if *Minneci* were overruled and *Bivens* was extended to protect to privately-held prisoners, it would fail to adequately vindicate these prisoners' rights.

Bivens claims often fail the first prong, as many courts consider the availability of state tort claims for privately-held prisoners to constitute alternative remedies precluding *Bivens.*[160] Indeed, the Supreme Court's holding in *Wilkie* broadened the class of remedies that may be deemed sufficiently adequate to foreclose a *Bivens* action by stating that Congressional action is not required.[161] This means that the success of a *Bivens* action would vary based on the state in which the prisoner is housed. As previously discussed, this is inadequate.[162]

The presence of "special factors counseling hesitation" may also defeat a *Bivens* claim. The Supreme Court has considered, among others, four special factors, the presence of which counsel against extending *Bivens*: (1) whether it is feasible for the court to create a

154. Pfander & Baltmanis, *supra* note 130, at 123.

155. Matthew Allen Woodward, *License to Violate the Constitution: How the Supreme Court's Decision in* Hui v. Castaneda *Exposes the Dangers of Constitutional Immunity and Revives the Debate over Widespread Constitutional Abuses in Our Immigration Detention Facilities*, 32 HAMLINE J. PUB. L. & POL'Y 449, 464–65 (2011) (citing Pfander & Baltmanis, *supra* note 130, at 118).

156. Pfander & Baltmanis, *supra* note 130, at 119.

157. Wilkie v. Robbins, 551 U.S. 537, 550 (2007).

158. *Id.* at 550.

159. *See* Wilkie, 551 U.S. at 541.

160. *E.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001); Holly v. Scott, 434 F.3d 287 (4th Cir. 2006).

161. Isabella Ruth Edmundson, *Imprisoned by Liability: Why* Bivens *Suits Should not be Available Against Employees of Privately Run Federal Prisons*, 45 GA. L. REV. 1127, 1139 (2011) ("[T]he *Wilkie* test is significant in that it confirms that the congressional action requirement for alternative remedies from *Carlson* has been replaced.").

162. *See supra* Part II.B.1.

workable cause of action;[163] (2) whether extending such a cause of action would undercut *Bivens*'s deterrence goals;[164] (3) whether the cause of action would impose asymmetric liability costs on privately-run facilities in comparison to government-run facilities;[165] and (4) whether there are any unique attributes that create a reason to infer that congressional inaction is deliberate and should not be altered.[166] This test gives federal judges wide latitude in deciding whether to find the presence of such special factors, leaving the availability of the prisoner's remedies to the misfortune of appearing before a judge who may be less inclined to take a broad view of *Bivens*. For example, in *Holly v. Scott*, the Fourth Circuit relied on these special factors to dismiss the prisoner's claims that inadequate medical care violated his Eighth Amendment right.[167] The fact that the "defendants [were] private individuals, not government actors," that the plaintiff had an "adequate remedy against the defendants" for his alleged injuries through a state tort negligence suit, and that the "defendants were private individuals employed by a 'wholly private corporation' was fatal to a *Bivens* claim."[168]

Ultimately, although *Bivens* provides federal prisoners in government-run prisons with a remedy, its success for privately-held federal prisoners would be thwarted by its fundamental weaknesses. It is also much more limited than the remedies afforded to state prisoners under § 1983. Whichever way they turn, privately-held federal prisoners are left with deficient remedies. An all-encompassing statutory approach is needed to protect the constitutional rights of federal prisoners, both public and private. Meaningful reform in this context must thus involve a reevaluation of who is ultimately responsible for the care of all federal prisoners.

V. IMPLICATIONS OF THIS REFORM

Because this Note advocates for society's unpopular prison population by affording them with greater protections, prompt Congressional action is doubtful. Nonetheless, the problem of prisoner abuse remains. In light of *Minneci*, reform is needed not only to guarantee the constitutional rights of all federal inmates but also

163. *See* Pollard v. GEO Group, 629 F.3d 843, 863 (9th Cir. 2010) (citations omitted) (citing *Wilkie*, 551 U.S. at 555).

164. *See id.*

165. *See id.*

166. *See id.*

167. Holly v. Scott, 434 F.3d 287 (4th Cir. 2006).

168. Edmundson, *supra* note 161, at 1142.

to compel more proactive oversight of the government's prison contractors.[169]

By holding the federal government directly accountable, this legislative proposal compels deterrence—a prominent feature of *Bivens* itself—on the federal government. Faced with potential liability, the federal government would ideally be more forceful in ensuring that its contracts with prison corporations contain clauses specifying appropriate standards for training, treatment and care of prisoners. This would hopefully compel the government to enforce these contractual provisions in an effort to enhance monitoring and training of private prison employees, establish performance benchmarks for contractors, oversee or take over failing prison facilities, and promote whistleblower protection for those reporting sub-standard conditions or constitutional violations. Without such an incentive, the federal government is likely to continue to shop for the lowest bidder without regard for its treatment of prisoners.[170]

Some commentators have voiced concerns that federal district courts are already inundated with prisoners' civil rights petitions.[171] This should not, however, discourage needed reform. Extending liability for wrongful actions in private prison facilities would not open the floodgates to prisoner litigation in federal courts. The most recent government data shows that the increase in the number of prisoner civil rights actions from 1980 to 2000 resulted from the increase in the prison population, not an increase in the rate of prisoner litigation.[172] Moreover, the Prisoner Litigation Reform Act (PLRA), passed in 1996,[173] would require all inmates to exhaust

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169. By contrast, in the case of CCA's egregious management of its prison facility in Youngstown, Ohio, the government became involved only after the grave prisoner mistreatment occurred, and its involvement was limited to requiring CCA to conduct an internal investigation. *See supra* notes 50–53 and accompanying text.

170. A recent state example shows that liability can be appropriately spread throughout the chain of responsibility. GEO, which operates three of New Mexico's four private prisons, was required by contract to pay New Mexico a $1.1 million settlement over several months for failing to adequately staff its correctional facilities with the proper ratio of guards per prisoner. Per the agreement, GEO is also required to spend $200,000 over the next year on efforts to recruit new correctional officers for one of the private prison facilities. The settlement was made possible because the contract between GEO and the State allowed New Mexico to penalize GEO when staffing vacancies at its facilities surpass 10 percent for more than thirty consecutive days. *See* Trip Jennings, *State Fines Private Prison Operator $1.1 Million Over Staffing Shortage*, THE NEW MEXICAN (Nov. 14, 2011), http://www.santafenewmexican.com/Local%20News/State-fines-private-prison-operator—1-1-million-over-staffing-.

171. *See, e.g.*, Pfander & Baltmanis, *supra* note 130.

172. JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980–2000, at 7 (2002).

173. 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail,

their administrative remedies before filing actions in federal court.[174] Prisoners' failure to exhaust all legal remedies provides an affirmative defense barring their claims.[175] In fact, between the years 1995 (the year before the enactment of the PLRA) and 2000, the number of civil rights petitions filed per 1,000 inmates fell from thirty-seven to nineteen.[176]

Extending claims to private prisoners would likely have only a nominal effect on the federal docket. Federal prisoners account for approximately 1,600 *Bivens* cases per year.[177] Since privately-held prisoners account for 16.4 percent of the federal prisoner population,[178] this correlates to only about 260 *Bivens* cases. Of these 260 cases, many would wind up in federal court through diversity or removal jurisdiction.[179] Consequently, there is no basis to believe that the proposed reform would have grave consequences for the federal court docket.

CONCLUSION

The increase in privatization of governmental functions has resulted in many federal prisoners being housed in private prison facilities operated under contract with the federal government. As a result of this outsourcing, these prisoners have lost the ability to effectively vindicate their Eighth Amendment right to be free from cruel and unusual punishment.

To help ensure that privately-held federal prisoners are not stripped of their constitutional rights simply by virtue of where they are incarcerated, this Note proposes legislation that would hold the

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prison, or other correctional facility until such administrative remedies as are available are exhausted."). The PLRA applies to prisoners in both state and federal prisons, whether public or private. *See* Ross v. County of Bernalillo, 365 F.3d 1181, 1184 (4th Cir. 2004); Lavista v. Beeler, 195 F.3d 254, 256 (6th Cir. 1999).

174. For example, one such administrative remedy by which the prisoner first must proceed is the BOP's Administrative Remedy Program. 28 C.F.R. § 542.13 (2012) ("[A]n inmate shall first present an issue of concern informally to staff, and staff shall attempt to informally resolve the issue before an inmate submits a Request for Administrative Remedy. Each Warden shall establish procedures to allow for the informal resolution of inmate complaints.").

175. *See* Jones v. Bock, 549 U.S. 199 (2007).

176. JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980–2000 (2002), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ppfusd00.pdf.

177. Brief for Respondent Richard Lee Pollard at 48, Minneci v. Pollard, 132 S. Ct. 617 (2012) (No. 10-1104), 2011 WL 4100439, at *48.

178. *See* WEST, SABOL & GREENMAN, *supra* note 24.

179. *Id.*

federal government responsible for the treatment of all its prisoners, no matter where they are housed. This would also create greater symmetry between the remedies afforded federal prisoners in government-run prisons and the remedies currently available to state prisoners under § 1983. Such legislative reform will hopefully have its greatest impact in correcting prison wrongs before they occur, by encouraging the federal government to engage in more effective oversight of all federal prisons, whether public or private, and to provide better protection to all federal prisoners.